Having taken into consideration all the aforesaid matters and the submission of counsel, I am of the opinion that in this case the interests of justice require that the defendant should be allowed extension of time to pay the sum of $8,000 into court and accordingly there will be an order that the defendant be at liberty to make such payment within one week from the date of extraction of the order herein. In order to give effect to this order, the judgment entered by default will have to be set aside and I order accordingly.

Now, coming to the question of stay of execution, I think it will be necessary for me to quote a passage from the *Annual Practice* 1957 page 194 under the heading of "Counter-claim".

"... Where the defendant has clearly no defence to the plaintiff's claim but sets up a plausible counter-claim for an amount not less than the plaintiff's claim, the order on the plaintiff's application under O. 14 should not be for leave to defend but should be for judgment for plaintiff on the claim with a stay of execution till the trial of the counter-claim, or pending further order...."

In view of the above passage, I do not think it is necessary for me to go into other authorities cited by counsel. It is sufficient to say that where there is a counter-claim, upon the hearing of an Order 14 application, even if judgment is given for the plaintiff on his claim, there should be stay of execution pending the trial of the counter-claim or pending further order.

In view of the above, I am of the opinion that in the present matter, even if the defendant still makes default in making payment as aforesaid, and the plaintiff proceeds to enter final judgment by such default, there will have to be incorporated in the judgment an order that there will be stay of execution pending the trial of the counter-claim. I order accordingly.

The costs of this application will be costs in the cause.

Order accordingly.

TAY CHO KOH & ORS. v. TAY EK SENG CO. SDN. BHD. & ORS.

[O.C.J. (Pawan Ahmad J.) December 13, 1973]
[Malacca — Originating Summons No. 68 of 1973]

Practice and Procedure — Written judgment variation of.

An application to vary the terms of a judgment where the judgment correctly stated what was actually decided and what was intended to be decided and where the court had taken time to consider the matter before putting its finding in the form of a written judgment cannot succeed.

Cases referred to:-

(1) *Harrison* v. *Harrison* [1955] 1 Ch. D. 260.

(2) *Tong Lee Hwa & Anor.* v. *Chin Ah Kwi* [1971] 2 M.L.J. pg. 79.

ORIGINATING SUMMONS.

Thara Singh for applicants.

A. L. Taye for respondents.

Pawan Ahmad J. (delivering oral judgment): After the hearing of the Originating Summons, certain orders were made and in particular orders were also made in terms of prayers 1-A, 2 and 3. As to prayer 1-A there was an alternative prayer numbered as 1-B but after having taken into consideration the affidavits filed in the matter and the submission of counsel, it was my considered opinion that an order should be made in terms of prayer 1-A rather than the alternative prayer 1-B.

As to prayers 2 and 3, it is the applicants' own prayer that an order as to the calling of the meetings should be directed either to Tay Ek Seng Co. Sdn. Bhd., the first respondent company and/or the directors of the said company. Here again it is my considered opinion that the best persons to call the meeting are the directors of the first respondent company and I accordingly ordered that the meeting be called by them rather than by the first respondent company.

The solicitors for the parties were unable to agree on the draft order and on obtaining appointment appeared before the learned Assistant Registrar for settlement of the said draft on 30 October 1973. The Assistant Registrar quite rightly referred the matter in dispute to me for my determination. When the matter came up before me on 9th November 1973, I adjourned the matter into open court for argument but in the meantime M/s. Sault & Co., the solicitors for the applicants took out Notice of Motion dated 27th November 1973 praying for variation of the judgment delivered by me on 8th October 1973 and it is this Notice of Motion which was taken for hearing on 5th December 1973.

According to paragraph 5 of the affidavit of Tay Seck Huan in support of the Motion "the applicants are advised by their solicitors, that in view of the difficulties which may be created by the 2nd and 3rd respondents to cause the said judgment to become ineffective, that proper application should be made to this Honourable Court for an order varying the terms of the said judgment so as to closely follow the prayers contained in the Originating Summons herein in order to defeat any further delaying tactics which may be adopted" etc.

In their affidavit in reply the respondents contend that the application of the applicants is premature as there is nothing at this stage to indicate that there will be refusal on the part of the second and the third respondents to comply with the terms of the judgment and that if at all they should have come before the court only after having been satisfied that the terms of the judgment had in fact not been complied with. Counsel for the respondents also submitted that in essence the applicants have got the orders that they themselves asked for in their prayers and that it is not proper for them now to come before the court and ask the court to vary its judgment so as to forestall some anticipated or imaginary difficulties which might arise after service of the order on the respondents.

At the hearing of the motion before me, counsel for the applicants placed reliance on the case of *Harrison* v. *Harrison*.(1) At page 264 Roxburgh J. said:

"The modern practice has grown up from the decision in *In re St. Nazarie Co.* In *In re Roberts* Kay J. said that "where an order had not been drawn up, whether it were an order made in chambers or in court, the judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and rehear the matter before making the final Order."

I must state here that the operative and relevant words in *Harrison* v. *Harrison* are "if something is brought to his attention which he had not sufficiently considered". I have to emphasize on these words for reason that although the hearing of the Originating Summons concluded on 15th August 1973, the written judgment was not delivered until 8th October 1973, in other words the court did in fact take time to consider the matter carefully before putting its findings in the form of written judgment.

Counsel for the applicants invited the court's attention to *Halsbury's* Vol. 22 page 772 paragraph 1645. What this paragraph lays down is the procedure to be adopted in the matter of obtaining variation of minutes. Here it must be emphasized that minutes taken down by the Registrar of an order made by a judge is quite a different thing from a written judgment. In a case where there is a written judgment any dispute as to the minutes can quite easily be put right by reference to the written judgment. I do not therefore think that the passage from *Halsbury's* can be of any assistance in the present matter. In *Tong Lee Hwa and Anor.* v. *Chin Ah Kwi*[2] at page 79 Gill F.J. said:

"After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action. The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order."

With due respect to counsel for the applicant, I cannot see that there has been a clerical mistake or error in the judgment but I must say that as far as I am concerned, my written judgment correctly states what I actually decided and intended to decide. For this reason, I hold that my judgment cannot be varied at this stage.

Some doubt was expressed by counsel for the respondents as to who should call the 13th adjourned Annual General Meeting. Paragraph 18(a) of my judgment indicates that the meeting is to be called within one week from the date of the service of the order on the second respondent as chairman of the first respondent company. It was my intention that the meeting should be called by the second respondent as chairman of the first respondent company and I confirm it is he who should call such meeting.

Due to the delay occasioned in settling the terms of the order it may now not be possible for the meetings to be called within the time stipulated in my judgment. It would now be up to either party concerned to make such application (if necessary) to the court for enlargement of time under Order 64 rule 7 to the calling of the meetings.

The Notice of Motion is dismissed with the costs to be paid by the applicants personally.

Order accordingly.

KHAW KOK SIN & ANOR. v. KHAW GIM LEONG CO. SDN. BHD. & ORS.

[O.C.J. (Chang Min Tat J.) December 14, 1973]
[Penang — Civil Suit No. 203 of 1973]

Practice and Procedure — R.S.C. 1957, O. 25 r. 4 — Whether evidence admissible or necessary — Inherent jurisdiction of court.

On an application for stay of an action under O. 25 r. 4 of the Rules of the Supreme Court only the statement of claim may be looked at but under the inherent jurisdiction of the court affidavit evidence may be received.

Cases referred to:-

(1) *Day* v. *William Hill (Park Lane) Ltd.* [1949] 1 K.B. 632 C.A.

(2) *Willis* v. *Earl Howe* [1893] 2 Ch. 551

CIVIL SUIT.

Gan Teik Chee for plaintiffs.

T. R. Hepworth for defendants.

Chang Min Tat J.: This is a family dispute. The two plaintiffs and the third defendant are brothers. The two companies named as defendants are family concerns. All the three brothers are directors, the third defendant being the managing director.

As at 31 December 1972, as alleged in the statement of claim the first plaintiff had $23,764.76 and $3,561.09 and the second plaintiff had $29,923.95 and $6,166.72 in continuing credit accounts in the two companies. On 22 June 1973, each plaintiff withdrew a sum of $2,900 from his account with first defendant and at the same time demanded payment of the balance. Each also demanded payment of the balance in the other account.

When their demands were not met, they commenced this action for a declaration that the sums were held in trust for them, payment and interests.

Appearance was entered and an application by summons-in-chambers was made for a stay of the proceedings on the ground that the action was frivolous and vexatious and an abuse of the process of the court.

At about the same time, an application was made by the plaintiffs for certain amendments of the amounts claimed and for signing of judgment.

Both summonses were heard by me in Chambers on 14 September 1973. They were fully argued, but at the end, a suggestion was thrown out that a settlement might be reached. Since this settlement has not materialised, I have now to rule on the applications.

The application for stay was said to be made under O.25 r.4 Rules of the Supreme Court and also under O.19 r.27.

It would perhaps be convenient if at this stage, I express the opinion that the application is not so much to strike out as unnecessary or scandalous pleadings or pleadings which may tend to prejudice, embarrass or delay the fair trial of the action, as provided for in O.19 r.27, as an application for stay under O.25 r.4. A stay could also be made under the inherent jurisdiction of the court.

Learned counsel for the defendants relied on *Day* v. *William Hill (Park Lane) Ltd.*[1] for the proposition that in such an application, affidavits could be filed and could be read.